FEDERAL COURT OF JUSTICE
(Bundesgerichtshof, BGH)
DECISION

3 StR 230/22

of
30 November 2022
in the criminal case
against

for genocide, among other things

The 3rd Criminal Division of the Federal Court of Justice, after hearing the appellant and the Federal Public Prosecutor General – with regard to point 2, at the latter's request – on 30 November 2022, pursuant to section 349(2) and (4) and section 354(1), by analogy, of the Code of Criminal Procedure (*Strafprozeßordnung , StPO*), has unanimously decided as follows:

1. Following the defendant's appeal on a point of law, the judgment of the Higher Regional Court of Frankfurt am Main of 30 November 2021 is amended to the effect that he is guilty of genocide in concurrence with the crime against humanity through enslavement, torture, causing serious bodily or mental harm and deprivation of liberty, resulting in death in each case, and with a war crime against persons through torture, resulting in death.

2. The further appeal on a point of law is rejected.

3. The appellant shall bear the costs of the appeal, the special costs incurred in this respect by the adhesion proceedings as well as the necessary expenses incurred by the co-plaintiff and adhesion plaintiff in the appeal on a point of law.

Reasons:

1 The Higher Regional Court (Oberlandesgericht) has found the defendant guilty 'of genocide in concurrence with a crime against humanity resulting in death, a war crime against persons resulting in death, aiding and abetting a war crime against persons in two concurrent offences and bodily harm resulting in death'. It has therefore imposed a life-long prison sentence on him. It has also determined the criterion for the recognition of foreign detention pending extradition and made a decision on adhesion. The defendant's appeal, which he bases on the complaints of infringement of formal and substantive law, results, with the appeal on the merits, in the amendment of the sentence, which is evident from point 1 of the wording of the operative part. Furthermore, the appeal is

unfounded pursuant to section 349(2) StPO.

A.

2 I. The Higher Regional Court has made the following findings:

3 The terrorist organisation ‘Islamic State’ (IS), which ran military operations in the Syrian and Iraqi civil war zones, pursued the Yazidi minority, who lived mainly in the area around the Sinjar mountains in northern Iraq, in its efforts to establish a global Islamic caliphate. In order to completely destroy the Yazidi religion, Yazidism and its members, IS fighters carried out a centrally planned, organised and coordinated military attack on the group’s members based in the Sinjar region during the night of 2 to 3 August 2014. In the ensuing period, the IS forced male Yazidis to convert to Islam, forced them to do forced labour, enslaved Yazidi women and girls, and executed members of the religious community en masse.

4 The defendant, who approved of the IS’s actions against the Yazidi religious group, had been in the Syrian Republic since at least March 2015 and worked there as head of the IS office for ‘Ru.’, a religious practice of exorcism to heal ailments. In June 2015, he bought two women as slaves, the co-plaintiff and her daughter Re., who was born on 5 June 2010. They were captured by IS members during the military attack on the Sinjar region in the summer of 2014. Around 2 weeks after buying them, the defendant took them from Syria to Iraq, to F. He forced them to stay there for several weeks, and also made the co-plaintiff work in his household, where he lived with the woman who was married to him under an Islamic rite. The Yazidi woman and her daughter had to follow the defendant’s orders. He had complete control over their lives, forbidding them to leave the property, did not give them enough food, forced them to say regular Islamic prayers, and mistreated them on a daily basis to discipline them and keep them compliant. As a result, they lived in constant fear of him.

5 The co-plaintiff and Re. suffered both physically and mentally to a great extent from the living conditions dictated by the defendant, and his treatment. Through

the serious bodily and mental harm caused to them, he wanted to make a targeted contribution in the spirit of IS ideology towards the destruction of Yazidism and its members – which he considered to be worthless – for the establishment of an Islamic caliphate.

6 On one day in August or September 2015, the defendant ordered the co-plaintiff at lunchtime to stand barefoot on the stone floor of the courtyard surrounding the house. In F. the maximum daily temperatures reached 51 degrees Celsius in the shade at that time of day. At the defendant's behest, the co-plaintiff returned to the house after a while and resumed her cleaning work, as instructed. The defendant was furious, however, because, due to illness, Re. had urinated on a mattress. In order to punish and discipline the 5-year-old, he tied her up by her hands at head height to the outside railings of the living room window, in the courtyard. The girl, who was therefore unable to move, was exposed to direct sunlight. After having tied her up, the defendant returned to the house. When he returned to the courtyard after some time, he untied Re., who in the meantime had suffered a heat stroke. As he could have foreseen, she had either already died from it or died in the immediate aftermath.

7 II. The Higher Regional Court, refraining from prosecuting offences other than those under the International Criminal Code, and as bodily harm resulting in death (section 154(2) and section 154a(2) StPO), legally assessed these findings as follows:

8 The defendant had committed a punishable offence of genocide pursuant to section 6(1) number 2 of the Code of Crimes against International Law (*Völkerstrafgesetzbuch, CCAIL*), by knowingly and willingly causing serious bodily harm and serious mental harm to the daughter of the co-plaintiff with the intention of destroying the religious group the Yazidis as such – regardless of the death that was caused only by negligence. In addition, he had unlawfully and culpably committed a crime against humanity resulting in death pursuant to section 7(1) and (3) CCAIL; his behaviour, which was part of the widespread and systematic attack by IS against the Yazidi civilian population, met the following

criteria in the list laid down in paragraph 1 with regard to both victims: ‘enslavement and trafficking in human beings’ (number 3), ‘torture’ (number 5), ‘causing severe physical or mental harm’ (number 8) and ‘severe deprivation of physical liberty’ (number 9). In addition, there was criminal liability for a war crime against persons resulting in death pursuant to section 8(1) number 3 (torture), section 8(4) first sentence CCAIL and aiding and abetting a war crime against persons in two concurrent offences pursuant to section 8(1) number 6 (‘expulsion or forcible transfer’), section 2 CCAIL, and section 27(1) and section 52 of the Criminal Code (*Strafgesetzbuch, StGB*). This is because in connection with the non-international armed conflict then taking place in Syria and Iraq, the defendant had not only treated two persons to be protected under international humanitarian law (section 8(6) number 2 CCAIL) in a cruel and inhuman manner, but also, through their forcible transfer to F., also promoted the IS practice of the expulsion and transfer of Yezidi women and girls by intensifying it in relation to the co-plaintiff and her daughter. Finally, he was guilty of bodily harm resulting in death pursuant to section 223(1) and section 227(1) StGB to the detriment of Re. The genocide, the crime against humanity, the two war crimes against persons and the crime under general criminal law were also concurrent offences under the law.

B.

9 I. The procedural complaints fail for the reasons set out in the application submitted by the Federal Public Prosecutor General.

10 II. The comprehensive substantive review judgment initiated by the substantive appeal merely results in an amendment of the sentence. On the basis of the findings of the Higher Regional Court, without committing any error in law, the defendant is guilty of genocide in concurrence with crimes against humanity through enslavement, torture, the infliction of serious bodily or mental harm and deprivation of liberty, in each case resulting in death, and with the war crime against persons through torture, but not of aiding and abetting a war crime against persons through expulsion in two concurrent offences and bodily harm

resulting in death. Moreover, the judgment does not contain any error in law prejudicial to the defendant. The amendment to the sentence does not affect the verdict.

11 1. The defendant's conviction for genocide pursuant to section 6(1) number 2 CCAIL, crimes against humanity resulting in death pursuant to section 7(1) numbers 3, 5, 8 and 9, all in conjunction with section 7(3) CCAIL and a war crime against persons resulting in death pursuant to section 8(1) number 3 in conjunction with paragraph 4 sentence 1 CCAIL – with the exception of the concurrence in law assessment (see 3. below) - was the subject of the review. In this respect, only criminal liability based on the infliction of serious bodily and mental harm pursuant to section 6(1) number 2 CCAIL and section 7(1) number 8 and section 7(3) CCAIL require further discussion.

12 a) The defendant is guilty of genocide. It is true that he did not commit the criminal offence listed under section 6(1) number 1 CCAIL, since, according to the findings of the Higher Regional Court, the defendant had not intended to kill the child pursuant to section 2 CCAIL and section 15 StGB (cf. MüKoStGB (*Münchener Kommentar zum StGB*)/Kreß, 4th ed., section 6 CCAIL, paragraph 70; MüKoStGB/Weigend/Kuhli, 4th ed., section 2 CCAIL, paragraph 8), but he did commit that listed under section 6(1) number 2 CCAIL. This type of crime occurs where the perpetrator causes serious bodily or mental harm, in particular of the type referred to in section 226 StGB, to a member of the national, racial, religious or ethnic group that they intend to destroy, in whole or in part. According to the findings of the judgment, these conditions have been met.

13 aa) The defendant acted with his own genocidal intent, necessary to meet these conditions.

14 The individual objective modalities of the offence under section 6(1) CCAIL, receive their particular injustice as genocide only through the intent, as required by that provision, to destroy as such, in whole or in part, one of the protected groups (with regard to section 220a StGB (former version), see Federal Court of Justice (Bundesgerichtshof, BGH), judgment of 30 April 1999 – 3 StR 215/98,

BGHSt (*Entscheidungen des Bundesgerichtshofes in Strafsachen*), pp. 45, 64 and 86). The desired success must be recognised in advance by the corresponding intent to commit the offence, in subjective terms, so to speak, as an excessive inner tendency (with regard to section 220a StGB (former version), see Federal Court of Justice, judgment of 21 February 2001 – 3 StR 372/00, BGHSt, pp. 46, 292 and 295). This subjective unlawful characteristic presupposes that the perpetrator himself, in the sense of a targeted desire, seeks the complete or partial destruction of the group, at least in terms of its social existence (see BGH, judgment of 21 May 2015 – 3 StR 575/14, BGHR CCAIL, section 6, number 1, paragraph 13; with regard to section 220a StGB (former version) see BGH, decision of 21 February 2001 – 3 StR 244/00, BGHR StGB, section 220a, number 1; also BGH, decision of 29 August 1996 – AK 30/96, BGHR StGB § 220a, number 2). It is sufficient if the desired success forms its intermediate objective; destruction does not have to be either its final aim or its motive, motive or motive for it (see BGH, judgment of 21 May 2015 – 3 StR 575/14, BGHR CCAIL, section 6, intention 1, paragraph 16).

15 The Higher Regional Court has based its decision on these legal criteria. It has found and substantiated in detail that the defendant, in the actions he took against the co-plaintiff and her daughter, in accordance with IS ideology, deliberately wanted to destroy the identifiable religious group of the Yazidis as such – the Yazidi religion, Yazidism and its members – and that that intention was ‘motivational as formative’. As stated above, it is irrelevant that, according to the findings of the judgment, this was only an interim goal of the defendant and that, in accordance with IS ideology, he was pursuing the ultimate goal of establishing an Islamic caliphate in which ‘apostates’ – such as the Yazidis – should, in principle, not have a right to exist, unlike ‘Followers of the Book’, such as Jews and Christians.

16 bb) In each case, the defendant knowingly and willingly caused at least serious bodily harm to the 5-year-old and, in any event, serious mental harm to the co-plaintiff.

17 (1) Serious harm suffered by the member of this protected group within the

meaning of the type of crime listed in section 6(1) number 2 CCAIL is to be understood as that resulting in 'a grave and long-term disadvantage to a person's ability to lead a normal and constructive life' (Jugoslawien-Strafgerichtshof, JStGH [Yugoslav Criminal Court], judgments of 2 August 2001 – IT-98-33-T, Krstic, paragraph 513; 8 April 2015 – IT-05-88/2-A, Tolimir, paragraphs 201-215; and 24 March 2016 – IT-95-5/18-T, Karadzic, paragraph 543)). The consequences of bodily or mental harm of the type specified in section 226(1) StGB are not required; however, the reference to the offence of serious bodily harm gives an indication of the necessary weight of the physical or health disadvantages caused by the infringement. This understanding is based on the following considerations:

18 (a) The provision of section 6(1) number 2 CCAIL largely corresponds to the earlier provision of section 220a(1) number 2 StGB, in force until 29 June 2022. The wording of the law was merely – for clarification (see with regard to section 220a(1), number 1 StGB (former version), BGH, judgment of 30 April 1999 – 3 StR 215/98, BGHSt, pp. 45, 64 and 70; also Gropengißer/Kreicker in Eser/Kreicker [Eds.], *Nationale Strafrecht völkerrechtskriminalität*, Vol 1, 2003, pp. 99 and 101; MüKoStGB/Kreß, 4th ed., section 6 CCAIL, paragraphs 49 and 52) – amended insofar as the plural 'members' was replaced by 'a member'.

19 By the law of 9 August 1954 (Federal Law Gazette [*Bundesgesetzblatt, BGBl.]* II, p. 729) on the accession of the Federal Republic of Germany to the Convention on the Prevention and Punishment of the Crime of Genocide 9 December 1948 (BGBl. 1954 II, p. 730 et seq.), section 220a lStGB was added to the Criminal Code. In doing so, the legislature had deliberately opted for a fundamentally close alignment of the wording of the newly created regulation with Article II of the Genocide Convention, in which the objective and subjective characteristics of the crime of genocide under international criminal law are defined (see BGH, judgment of 30 April 1999 – 3 StR 215/98, BGHSt, pp. 45, 64 and 79, with further references; MüKoStGB/Kreß, 4th ed., section 6 CCAIL, paragraphs 26 and 28). This international treaty defines as one of the recorded acts 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such' – under (b) – 'causing serious bodily or mental

harm to members of the group'.

20 However, the government draft of 23 December 1953 for the act on the accession of the Federal Republic of Germany to the Genocide Convention for the second type of offence in paragraph 1 of the planned § 220a StGB still provided the wording: 'bodily harm of the type indicated in section 224 StGB (former version) on members of the group'. The alignment with the former Criminal Code on serious bodily harm had the aim of defining the crime of genocide as precisely as possible and ensuring a uniform interpretation of serious injury consequences in the Criminal Code (Bundestag document [*Bundestagsdrucksache, BT-Drucks.*] II/162 pp. 2 and 4). It was only as a result of the deliberations of the Bundestag Committee for Legal Affairs and Constitutional Law on 3 May 1954 that the second offence under section 220a(1) StGB was replaced by the version corresponding to the currently applicable provision of section 6(1) number 2 CCAIL. The reason for this was that, in the view of the participants, the offence of serious bodily harm (alone) did not fully cover the serious mental harm. Therefore, contrary to the wording of the legislative proposal, approved unanimously, the committee members referred to the addition of 'in particular' exclusively to the mental impairments (see German Bundestag, 2nd parliamentary term, 16th Committee Minutes No 13 [13th meeting on 3 May 1954], p. 12 et seq.; MüKo- StGB/Kreß, 4th ed., section 6 CCAIL, paragraph 50 et seq.).

21 However, the question whether this legislative history has any consequences for the interpretation of serious bodily and mental harm within the meaning of section 220a(1) number 2 StGB (former version) can be left open. Nor is it of any significance whether the judgment of the Criminal Division of 20 April 1999 (3 StR 215/98, BGHSt, pp. 45 and 64) on crimes of genocide in the former Yugoslavia could provide a uniform understanding of the factual conditions laid down in that provision and of section 224(1) StGB (former version) (see loc. cit., p. 84).

22 (b) This is because, in any event, since section 220a StGB (former version) was replaced by section 6 CCAIL, an interpretation restricting the wording of the law

can no longer be justified. An interpretation to the effect that serious (bodily) harm within the meaning of section 6(1) number 2 only exists if the consequences of injury are of the type referred to in section 226(1) StGB would be contrary to the intention of the legislature when introducing the Code of Crimes against International Law.

23 The criminal provisions of the Rome Statute of the International Criminal Court (ICC Statute) were to be implemented with this largely independent body of regulations. This was to ensure that the Federal Republic of Germany was always able to prosecute crimes falling within the jurisdiction of the International Criminal Court (ICC). The legislature saw an important step in transposing established customary international law into national law in its approach to the criminal provisions of the ICC Statute, including the 'elements of crimes' formulated in this regard; this is because it considered that the customary law of international criminal law was essentially enshrined in the ICC Statute. Therefore, it wanted to bring the German legislation into line with the ICC statute, its elements of crimes and its interpretation by the ICC, taking into account the case-law of other international criminal courts (see BT-Drucks.14/8524, p. 12 et seq.; BGH, judgment of 27 July 2017 – 3 StR 57/17, BGHSt 62, p. 272, paragraph 19; Werle/Epik, *JuristenZeitung*, JZ 2018, pp. 261 and 262; aA Berster, CIS 2017, pp. 264 and 265).

24 With regard to the provision of Article 4(2)(b) of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute), which is identical to Article 6(b) ICC Statute, it is recognised that bodily and mental harm are to be considered serious if they result in 'a grave and long-term disadvantage to a person' s ability to lead a normal and constructive life' [ICTY, judgments of 2 August 2001 – IT-98-33-T, Krstic, paragraph 513; 8 April 2015 – IT-05-88/2-A, Tolimir, paragraphs 201-215; and 24 March 2016 IT-95-5/18-T, Karadzic, paragraph 543)). This is similarly the case for Article 2(2)(b) of the Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), which is also identical (see ICTR, judgment of 12 September 2006 – ICTR-00-55A-T, Muvunyi, paragraph 487). Therefore, a merely temporary health disadvantage is not sufficient, although it does not have to be permanent or irreversible (see ICTR

Statute, judgments of 2 September 1998 – ICTR-96-4-T, Akayesu, paragraph 502; 21 May 1999 – ICTR-95-1-T, Kayishema et al., paragraph 110; 12 March 08 – ICTR-01-66-A, Seromba, paragraph 46; with regard to the whole issue, *Werle/Jeßberger, Völkerstrafrecht*, 5th ed., paragraph 897, with further references).

25 The adoption of this definition from international criminal law for the offence under section 6(1), subparagraph 2 CCAIL proves to be appropriate in accordance with the legislative intention associated with the introduction of the Code of Crimes against International Law (see also MüKoStGB/Kreß, 4th ed., section 6 CCAIL, paragraph 50). Furthermore, the fact that the offence provided for in Article 6(b) ICC Statute is explained in a footnote to the 'elements of crimes' to the effect that the causing of serious bodily and mental harm may include 'inhuman or degrading treatment' supports a broader understanding of this type of offence compared with section 226(1) StGB. Although the 'elements of crimes' are not legally binding, they serve, in accordance with the first sentence of Article 9(1) ICC Statute, to interpret the criminal offences standardised in Articles 6, 7, 8 and 8*bis* ICC Statute (see, in this regard, *Werle/Jeßberger, Völlkerstrafrecht*, 5th ed., paragraph 235 et seq.). They may also be used as aids in applying German law (see BGH, decision of 8 September 2016 – StB 27/16, BGHR CCAIL, section 8(1), number 9, 'a person who is to be protected' I., paragraph 22; Werle/Epik, JZ 2018, pp. 261 and 262; critical Ambos, NJW 2017, p. 3672).

26 (2) The Higher Regional Court based its legal assessment on the abovementioned understanding of the offences provided for under section 6(1)(2) CCAIL and correctly assumed that the defendant, acting wilfully and knowingly, caused serious bodily harm to Re. and serious mental harm to the co-plaintiff.

27 The physical impairments of the co-plaintiff's 5-year-old daughter were the result of continued punishments over a period of several weeks, with the defendant beating her daily, among other things. The assaults were sometimes so massive that the girl had to stay in bed for a few days. Finally, the defendant exposed the

5-year-old to direct sunlight in the midday heat, tied up by her arms on the right and left at head level, which – regardless of the death not caused intentionally – had very serious consequences for her health. Furthermore, he did not give enough food to the child, who was still physically developing, and thus left her starving all the time. The impairments were not just of a temporary nature, but rather of an indefinite duration and had lasted for a very considerable period of time.

28 The mental impairments suffered by the co-plaintiff herself were caused not only by her own living conditions dictated by the defendant over several weeks – which were characterised by violence, deprivation of liberty, coercion of work and prayer, shortages and fear – but in particular by the fact that she had to endure the suffering of her daughter without being able to stop it. On one occasion, the co-plaintiff wet herself after she and the girl had been hit. On another occasion, the defendant threatened to kill the child. When the child had suffered the heat stroke, he would not allow the mother to accompany him to the hospital. He left her in the dark about the whereabouts of the corpse. The co-plaintiff still needs psychological care today.

29 It follows from all of the foregoing that the bodily harm caused to Re. intentionally by the defendant and the mental harm suffered by the co-plaintiff must be regarded as serious because, as he knew, it severely and permanently impaired the ability of both of them to lead a normal and constructive life. In accordance with the Higher Regional Court, the degree of severity is also to be regarded as comparable to the effects of the consequences of harm within the meaning of section 226(1) StGB.

30 cc) There is much to suggest that, in addition to the intention to commit genocide, the offence under section 6(1)(2) CCAIL contains an element of the objective ability to achieve the intended result. Such an unwritten element would have to be defined in such a way that the perpetrator's harm-causing acts were either able to cause the whole or partial destruction of the group as such, or were linked to a clearly recognisable pattern of similar acts directed against the group, and the overall approach was able to cause that destruction. The question of whether

this restrictive interpretation of section 6(1), number 2 CCAIL is necessary can ultimately be left open here. This is because, first, these conditions in the second alternative are substantiated by the findings of the judgment; second, such an objective element should in any event not be subject to any further requirements. Specifically:

31 (1) The requirement of actual ability to achieve a result can be deduced from the elements of crimes provided for under Article 6 ICC Statute, especially since the justification of the draft law for the introduction of the Code of Crimes against International Law submitted by the Federal Government expressly refers to those provisions with regard to the offence referred to in section 6 CCAIL (see BT-Drucks.14/8524, p. 19).

32 According to point 4 of the elements of crimes relating to Article 6(b) ICC Statute, an integral part of the crime of genocide by causing serious bodily or mental harm consists in the fact that the behaviour to be assessed is linked to a clearly recognisable pattern of similar behaviour directed against the group or which, in turn – as more closely defined elsewhere – could bring about its destruction ('took place in the context of a manifest pattern of similar conduct directed against that group or could itself effect such destruction'). This suggests that the international criminal law provision should not be applied if the perpetrator's actions, both considered in isolation and in combination with acts of a similar nature committed by others, are from the outset incapable of achieving the intended result.

33 (2) The fact that the crime of genocide includes an unwritten characteristic regarding the objective relationship of causing serious harm for the intended (partial) destruction of the group is consistent with the case-law of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Court of Justice (ICJ).

34 The ICTY and the RStGH have in principle recognised such a requirement. However, it is not defined uniformly in the individual case-law. On the one hand, the necessary quality of the harm caused – similar to a judgment of the ICJ of 3 February 2015 (Croatia v. Serbia, I.C.J. Reports 15, 3, paragraph 157) – is described as 'to contribute or tend to contribute to the destruction of the group or

part thereof' [ICTY, judgments of 27 September 06 – IT-00-39-T, Krajsnik, paragraph 862; 12 December 12, IT-05-88/2-T, Tolimir, paragraph 738; and see Werle/Jeßberger, *Völkerstrafrecht*, 5th ed., paragraph 897]). On the other hand, there is the wording – based on work by the United Nations International Law Commission (Yearbook of the International Law Commission 1996, Volume II, Part 2 [YILC 1996 II-2], p. 46, No 14) – that the harm caused to the members must be 'of such a serious nature as to threaten its destruction in whole or in part' [ICTY, judgments of 12 March 2008 – ICTR-01-66-A, Seromba, paragraph 46; 20 December 2012 – ICTR-99-54-T, Ngiekontaute, paragraph 1326; ICTY, Judgment of 8 April 2015 – IT-05-88/2-A, Tolimir, paragraph 212; see Ambos, *Internationales Strafrecht*, 5th ed., section 7, paragraph 132, with further references; rejecting Ambos, *Treatise on International Criminal Law*, Volume II, 2014, p. 12]).

35 In any case, the definition in the decisions first cited comes close to the element of objective ability to achieving results, that is taken as a basis here. In this regard, the wording 'to contribute or tend to contribute' indicates that the perpetrator's behaviour is not the only decisive factor, but must be assessed in the context of the circumstances of the case the context of similar actions by others.

36 The latter decisions may be understood to mean that they are based on the risk of success ('to threaten') (according to Ambos, *Internationales Strafrecht*, 5th ed., section 7, paragraph 132). However, such a criterion was essentially consistent with the element of ability. This is because if an event is able to bring about success, there will usually also be a corresponding risk if it has actually taken place. It is immaterial whether the wording in question chosen by the international criminal courts is based on an understanding according to which the assessment of such a risk of destruction should only depend on the behaviour of the perpetrator, which is to be considered in isolation. They do not automatically give rise to such an interpretation of the ICC and ICTY Statutes. In any event, it would not be relevant to the offence provided for under section 6(1), number 2 CCAIL (see also MüKoStGB/Kreß, 4th ed., section 6 CCAIL, paragraph 50).

37 (3) The defendant's actions, which caused serious harm to the co-plaintiff and Re., together with similar actions by other IS members, were capable of destroying the religious group of the Kurds of the Yazidi faith.

38 According to the findings of the judgment, the offence committed by the defendant was part of the centrally planned action against Yazidis living in the Sinjar region. This is because the co-plaintiff and her daughter were also captured during the military attack and subsequently sold as slaves. Their enslavement by the defendant was the basis of the bodily and mental abuse committed by him and was part of the overall events characterised by the mass of similar behaviour motivated by an unconditional desire for destruction. The organised enslavement of women and girls, especially in connection with religious re-education, served to destroy the Yazidi religious minority in order to establish an Islamic caliphate. Overall, the procedure was capable of bringing about success – the (partial) destruction of this group, as such.

39 b) The defendant is guilty of a crime against humanity by causing serious bodily or mental harm, resulting in death (section 7(1) number 8 and section 7(3) CCAIL).

40 Since the defendant, on the basis of the findings of the Higher Regional Court, intentionally caused at least serious bodily harm to the daughter of the co-plaintiff, and at any event serious mental harm to the daughter herself, he committed the offence listed under number 8 of the list of individual offences laid down in section 7(1) CCAIL. In this respect, the legislature deliberately chose the version of the crime of genocide pursuant to section 220a(1)(2) StGB (former version) and section 6(1)(2) CCAIL (see BT-Drucks. 14/8524, p. 22; Gropengißer/Kreicker in Eser/Kreicker [eds.], *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, Vol 1, 2003, p. 137 et seq.). Thus, for this crime against humanity, it is also sufficient, but also necessary, that the harm caused to the injured person results in a serious and long-lasting impairment of their ability to lead a normal and constructive life (see MüKoStGB/Werle/Jeßberger, 4th ed., section 7 CCAIL, paragraph 99 [reference to section 226 StGB merely by way of example], p. 102).

41 There is no need to explain in greater detail that IS conducted a widespread and systematic attack against the Yazidi civilian population living in the Sinjar region (see BGH, decisions of 17 June 2010 – AK 3/10, BGHSt 55, 157, paragraphs 24 et seq.; 9 February 2021 – AK 5/21, juris, paragraph 32 et seq., with further references), the defendant's actions were functionally integrated into this overall offence (see BGH, decision of 7 October 2021 – AK 43/21, juris, paragraph 24, with further references) and for him, predictably had resulted in Re.'s death.

42 2. However, the conviction for aiding and abetting the war crime against persons through expulsion in two offences punishable by a single penalty (section 8(1) number 6 CCAIL, section 27(1) and section 52 StGB) and for bodily harm resulting in death (section 223(1) and section 227(1) StGB) must be annulled.

43 a) The defendant did not – successively – aid and abet the war crime against persons through expulsion within the meaning of section 8(1), number 6 CCAIL, which IS members committed to the detriment of the co-plaintiff and her daughter and to the detriment of the Yazidis in general.

44 aa) Admittedly, members of the terrorist organisation unlawfully committed the offence referred to in section 8(1), number 6 CCAIL. This states that whoever connection with an international armed conflict or with an armed conflict not of an international character deports or forcibly transfers, by expulsion or other coercive acts, a person who is to be protected under international humanitarian law (section 8(6) of the CCAIL), and lawfully present in an area to another State or another area in contravention of a general rule of international law, shall be punished.

45 (1) This criminal provision is based on the provisions of Article 8(2)(a)(vii) of the ICC Statute for international conflict and Article 8(2)(e)(viii) of the ICC Statute for non-international conflict, which the legislature summarised while retaining its material content (see BT-Drucks. 14/8524, p. 27). The latter legal provision is based on the first sentence of Article 17(1) of the Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (BGBl. 1990 II p. 1637; 'ZP II'). According to this provision, the expulsion of the civilian

population shall not be ordered for reasons relating to the conflict unless the security of the civilians involved or imperative military reasons so demand. The rule is based on the legal principles of Article 49(1) and (2) of the IV Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (BGBl 1954 II p. 917; 'GC IV') (see Werle/Jeßberger, *Völkerstrafrecht*, 5th ed., paragraph 1343), applicable to international armed conflict. However, section 8(1), number 6 CCAIL does not penalise the order for the transfer, but rather the transfer itself; it is sufficient if it also only concerns one person who is to be protected under international humanitarian law (see BT-Drucks. 14/8524, p. 27; MüKoStGB/Geiß/Zimmermann, 4th ed., section 8 CCAIL, paragraphs 170 and 172; with regard to the restriction of the offence to civilians in accordance with Article 147 GC IV, see Gropengißer/Kreicker in Eser/Kreicker [eds.], *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, Vol 1, 2003, p. 172).

46 section 8(1) number 6 CCAIL includes the expulsion and forcible transfer in any form from one's legal place of residence to another, against one's free will, as a criminal offence (see BT-Drucks. 14/8524 pp. 20 and 27; MüKoStGB/Geiß/Zimmermann, 4th ed., section 8 CCAIL, paragraph 173 et seq.), in the case of expulsion outside the territory of the State, in the case of transfer within the territory of the State (with regard to international law, see Werle/Jeßberger, *Völkerstrafrecht*, 5th ed., paragraph 1343). Both alternatives require action in violation of a general rule of international law within the meaning of Article 25 GC (see MüKoStGB/Geiß/Zimmermann, loc. cit., paragraphs 26 and 177).

47 (2) The behaviour of the IS members in the attack against the Yazidis living in the Sinjar region meets the conditions laid down in section 8(1), number 6 CCAIL.

48 According to the findings of the judgment, IS systematically abducted Yazidi women and children. Under the threat of armed force, he first took them via holding facilities to group accommodation not far away. Then, using coercion, he distributed them to the territories he occupied, preferably to M. and R.. From

these dwellings, women and older girls were already being ‘marketed’ directly as domestic and sex slaves; they were also brokered via central slave markets and online auctions, and later also ‘traded’ privately. The co-plaintiff and her daughter Re. had also been captured by IS fighters in the Sinjar region near their home town on 3 August 2014. They had been forcibly taken to R. by group members via various detention centres in Iraq. There, they were sold and purchased as slaves several times before they finally came into the hands of the defendant.

49 The Yazidi civilians were persons to be protected under international humanitarian law within the meaning of section 8(6), number 2 CCAIL (with regard to the conditions, see BGH, judgment of 20 December 2018 – 3 StR 236/17, BGHSt 64 and 10, paragraphs 78 et seq. and 84 et seq.; decision of 4 April 2019 – AK 12/19, NStZ-RR 2019, pp. 229 and 231). The forcible transfer of these people to other areas was in the necessary functional connection with the non-international armed conflict then prevailing in Iraq (see BGH, judgment of 27 July 2017 – 3 StR 57/17, BGHSt 62 and 272, paragraph 55, with further references; decision of 17 October 2019 – AK 56/19, juris, paragraph 38). The actions of the IS members who committed the offence, for which there was no legitimate objective reason, violated a general rule of international law as expressed in the provisions of the GC IV and the ZP II (see BT-Drucks. 14/8524, pp. 21 and 27; MüKoStGB/Geiß/Zimmermann, 4th ed., section 8 CCAIL, paragraph 179, with further references).

50 bb) The Higher Regional Court did not, however, make any findings that support its assessment that the defendant provided assistance with this main offence within the meaning of section 27(1) StGB.

51 (1) By bringing the co-plaintiff and Re. from Syria to Iraq to F., the defendant did not make a valid contribution towards assistance by deepening their expulsion.

52 In the present case, there is no successive aiding and abetting in the predicate offence after its completion but before its material termination (see BGH, judgment of 24 June 1952 – 1 StR 316/51, BGHSt 3, paragraphs 40, 43 et seq.; decision of 5 May 2021 – 3 StR 465/20, *Neue Zeitschrift für Strafrecht – Rechtsprechungs-Report*, NStZ-RR 2021, paragraph 374, with further

references). The expulsion of the co-plaintiff and her daughter was complete after IS members had abducted them from the Sinjar region of Iraq across the state border to Syria. The fact that the defendant returned her from there to Iraqi territory does not intensify the act or the result of the offence. This is all the more true given that F. is not significantly further away from the place of capture than R. and it has not been established or otherwise apparent that the two Yazidi women were lawfully resident on Syrian territory.

53 (2) Neither with these or other acts against the co-plaintiff and Re., nor in any other ways, did the defendant contribute to promoting the expulsion and transfer practice generally practised by IS, in particular not by means of psychological aiding and abetting (see, in this regard, BGH, decision of 11 January 2022 – 3 StR 452/20, juris, paragraph 33, with further references).

54 It must be borne in mind that, in the case of organised mass crimes, the addressees of psychologically mediated influences may be managers who dictate or direct the commission of the offence (see BGH, judgment of 20 February 2014). 20 December 2018 – 3 StR 236/17, BGHSt 64, 10, paragraph 107). This is particularly conceivable if the leaders are able to rely on a solid structure of willing, obedient and reliable subordinates for a criminal enterprise they are considering. Their noticeable willingness to engage in certain criminal acts may encourage decision-makers to order the corresponding criminal offences (see BGH, decisions of 20 September 2016 – 3 StR 49/16, BGHSt 61, 252, paragraph 23 et seq.; and 6 June 2019 – StB 14/19, BGHSt 64, 89, paragraph 78). However, it has not been established that the defendant was involved in such a way in the expulsion and transfer practice, and thus in a system for the practical implementation of the centrally ordered forcible transfer of Yazidi civilians.

55 b) Bodily harm resulting in death takes precedence over crimes against humanity resulting in death pursuant to section 7(1) numbers 5 and 8, and section 8(3) CCAIL and war crimes against persons resulting in death pursuant to section 8(1) number 3 and section 8(4) first sentence CCAIL (with regard to the application of sections 7 and 8 CCAIL in addition to section 6 MüKoStGB/Kreß,

4th ed., section 6, paragraph 110; MüKoStGB/Werle/Jeßberger, 4th ed., section 7 CCAIL, paragraph 142 et seq.; MüKoStGB/Ambos, 4th ed., preliminary remark section 8 CCAIL, paragraph 47). Whether this also applies to the genocide pursuant to section 6(1) number 2 CCAIL does not require a decision in the present case (see, with regard to section 220a StGB (former version), judgment of 30 April 1999 – 3 StR 215/98, BGHSt 45, 64, 85 and 91; also MüKoStGB/Kreß loc. cit., paragraph 107).

56 Not only a war crime against persons (see BGH, judgment of 28 January 2021 – 3 StR 564/19, BGHSt 65, 286, paragraph 82), but also a crime against humanity can supersede criteria protecting individual rights under general criminal law by a concurrence in law. This is because, regardless of the direction of protection of section 6 CCAIL (see on the one hand, BGH, judgment of 30 April 1999 – 3 StR 215/98, BGHSt 45, 64 and 81 et seq. [with regard to section 220a StGB (former version)]; decision of 3 February 2021 – AK 50/20, *Strafverteidiger*, StV 2021, 596, paragraph 48; Gropengißer/Kreicker in Eser/Kreicker [eds.], *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, Vol 1, 2003, p. 96 .; and on the other hand Ambos, *Internationales Strafrecht*, 5th ed., section 7, paragraph 125; MüKoStGB/Kreß, 4th ed., section 6, paragraphs 1 and 2; Werle/Jeßberger, *Völkerstrafrecht*, 5th ed., paragraph 870, with further references in each case), section 7 et seq CCAIL aims at least also to protect the highest personal legal rights of the individual persons concerned by the objective acts (see BGH, decision of 3 February 2021 – AK 50/20, loc. cit., paragraph 45).

57 There is unity in the law where behaviour meets several criminal provisions, but the application of one of them is sufficient to record the unlawfulness of the offence, after which the others subsequently withdraw (see, in general, BGH, decision of 29 April 2020 – 3 StR 532/19, NStZ-RR 2020, 243, with further references; BGH, decision of 11 June 2020 – 5 StR 157/20, BGHSt 65, 36, paragraph 19 et seq.; judgment of 28 January 2021 – 3 StR 564/19, BGHSt 65, 28, paragraph 82 [with regard to section 8 CCAIL]). So it is with section 223(1) and section 227(1) StGB in relation to section 7(1) numbers 5 and 8, section 7(3), section 8(1) number 3, and section 8(4) first sentence CCAIL. The

infliction of serious bodily or mental harm resulting in death and considerable bodily or mental harm or suffering (torture) resulting in death, as part of an attack on the civilian population or in connection with armed conflict, is at least, regularly and typically, also a bodily injury resulting in death. An exceptional case in which the death of the injured person can be attributed to mental harm or suffering that does not meet the criteria of section 223(1) StGB seems hardly conceivable and is to be disregarded for the purposes of the assessment with regard to the concurrence in law.

58 Withdrawing from an accessory prosecution offence within the meaning of section 395(1), number 3 StPO is irrelevant for the right to accessory prosecution because the effectiveness of the subsequent declaration is not precluded if there is a concurrence in law between the official offence and it (see KK-StPO/Allgayer, 9th ed., section 395, paragraph 19, with further references).

59 3. Furthermore, the concurrent offences are to be assessed as the basis for the new version of the sentence as follows:

60 a) With regard to the crimes against humanity resulting in death pursuant to section 7(1) numbers 3, 5, 8 and 9 and section 7(3) CCAIL, the four offences committed by the defendant in the list are in unequal notional concurrence with each other. These individual offences are therefore to be included in the operative part of the judgment; it is advisable (see section 260(4), sentence 5 StPO) to use the abbreviations cited in the explanatory memorandum to the draft law introducing the Code of Crimes against International Law: enslavement, torture, serious bodily or mental harm and deprivation of liberty (see BT-Drucks. 14/8524, paragraph 20 et seq.).

61 aa) The fact that the list of offences under section 7(1) CCAIL are fundamentally in concurrence with one another is evident in particular from its type of protection and the structure of the offence. In this respect, the crime against humanity differs from genocide in which the defined methods of committing the offence do not constitute independent offences, but rather methods of committing the same offence, characterised by the genocidal intent of the perpetrator (see BGH, judgment of 30 April 1999 – 3 StR 215/98, BGHSt 45, 64, 81 et seq. [with regard

to section 220a StGB (former version)]; decision of 3 February 2021 – AK 50/20, StV 2021,596, paragraph 48).

62 The individual offences regulated in section 7(1) CCAIL which, as explained, serve at least to protect highly personal legal rights, cover very different individual rights, namely life, health, freedom and sexual self-determination (see MüKoStGB/Werle/Jeßberger, 4th ed., section 7(1) CCAIL). According to that provision, although in the case of crimes against humanity – unlike in the case of war crimes against persons (see BGH, judgment of 28 January 2021 – 3 StR 564/19, BGHSt 65, 286, paragraph 80) – the general rules applicable to offences against highly personal legal rights do not apply without restriction (see BGH, decision of 3 February 2021 – AK 50/20, StV 2021, 596, paragraph 49), it seems reasonable not to regard in law the list of offences laid down under section 7(1) CCAIL – as in the case of section 8(1) CCAIL (see, for example, BGH, decision of 21 September 2020 – StB 28/20, juris paragraph 24) – as offence methods, but as separate offences; (see more recently BGH, decisions of 4 May 2022 – AK 17/22, NStZ-RR 2022, 227, 228; 12 October 2022 – AK 32/22, juris, paragraph 8; also MüKoStGB/Werle/Jeßberger loc. cit., paragraph 144). This is also supported by the level of wrongdoing, which is graded according to the legal assessment, which is expressed by the fact that three different ranges of punishment are provided for the individual offences.

63 In addition, the assumption of notional concurrence corresponds to the case-law of the international criminal courts, according to which the individual crimes against humanity can, in principle, be carried out alongside one another (see, for example, ICTY, judgment of 12 June 2002 – IT-96-23 and IT-96-23/1-A, Kunarac et al., paragraphs 179 and 186; see Werle/Jeßberger, *Völkerstrafrecht*, 5th ed., paragraph 1121, with further references).

64 bb) No exception should be made to this principle in respect of the offences laid down in section 7(1) numbers 3, 5, 8 and 9 CCAIL, because none of them is superseded by one of the others. This also applies to crimes against humanity by causing serious bodily or mental harm: Insofar as Article 7(1)(k) ICC Statute (‘other inhumane acts of a similar character’) on which section 7(1) number 8

CCAIL is based (see BT-Drucks. 14/8524, page 22; MüKoStGB/Werle/Jeßberger, 4th ed., section 7 CCAIL, paragraph 98), was conceived as a subsidiary 'catch-all' provision (see Ambos, *Internationales Strafrecht*, 5th ed., section 7, paragraph 219; Werle/Jeßberger, *Völkerstrafrecht*, 5th ed., paragraphs 1115 and 1122), this cannot be transferred to that national criminal provision. This is because its criteria were deliberately defined more narrowly than its international model on account of the principle of certainty pursuant to Article 103(2) of the Basic Law for the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland, GG*) (see BT-Drucks.14/8524, p. 22); consequently, it also embodies a specific worthlessness.

65 b) Insofar as the general rules for offences against highly personal legal rights are applicable (see just a) aa)), it is true that, contrary to the view of the Higher Regional Court, in the event of a (partial) identity of the acts performed to the detriment of various victims, there is a similar notional concurrence on the basis of only one substantive act (see, in general, BGH, decision of 4 April 2019 – AK 12/19, juris, paragraph 60; also BGH, judgment of 28 January 2021 – 3 StR 564/19, BGHSt 65, 286, paragraph 80). However, in view of the clarity and comprehensibility of the conviction, the Division refrains from including this concurrence in the operative part of the decision (see BGH, decision of 31 May 2016 – 3 StR 54/16, NStZ-RR 2016, 274, 275; judgment of 28 January 2021 – 3 StR 564/19, loc. cit., paragraph 84).

66 c) The sentence must be amended in accordance with section 354(1) StPO. The provision of section 265 StPO is not in conflict, because the defendant could not have defended himself more effectively than he did. The prohibition on aggravation under section 358 StPO does not prevent the sentence from being increased in part (see BGH, decision of 7 September 2022 – 3 StR 165/22, juris, paragraph 30).

67 4. The sentence may remain unchanged It must be ruled out that the Higher Regional Court would have waived the life imprisonment provided as the standard penalty under section 6(1) CCAIL and would have accepted a less

serious case under section 6(2) CCAIL if it had found that the defendant was not liable for punishment for aiding and abetting a war crime against persons through expulsion and had correctly assessed the concurrent offences. Compared to the large number of other more serious offences committed by the perpetrators, the act of aiding and abetting was clearly not of decisive importance for the range of sentences. Concurrence does not usually affect the wrongdoing and culpability – as also in the present case – (see, for example, BGH, decisions of 25 June 2019 – 3 StR 130/19, juris, paragraph 9, with further references; and 3 November 2021 – 3 StR 231/21, juris, paragraph 18).

68 III. In view of the low level of success of the appeal on a number of law, it is not unreasonable to charge the defendant the full costs of his appeal (section 473(4) StPO).

Schäfer Paul Berg

Hohoff Seizure

The previous instance:

the Higher Regional Court of Frankfurt am Main, 30 November 2021 - 5 - 3 StE 1/20 - 4 - 1/20